

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

DEC 10 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0138-PR
)	DEPARTMENT A
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
FEDERICO AROS,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20042822

Honorable Frank Dawley, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barton & Storts, P.C.
By Brick P. Storts, III

Tucson
Attorneys for Petitioner

H O W A R D, Presiding Judge.

¶1 A jury found petitioner Federico Aros guilty of kidnapping, fleeing from a law enforcement vehicle, and four counts of sexual assault. The trial court sentenced him to a total of fifty-nine years' imprisonment, comprised of two concurrent and four consecutive

prison terms, all slightly mitigated but enhanced on the basis of Aros's two previous felony convictions. This court affirmed the convictions and sentences on appeal. *State v. Aros*, No. 2 CA-CR 2005-0285 (memorandum decision filed June 22, 2006).

¶2 Aros then filed a timely notice of post-conviction relief pursuant to Rule 32.4, Ariz. R. Crim. P. The trial court appointed counsel, who subsequently filed a petition on Aros's behalf, alleging ineffective assistance of trial counsel in three specific instances. The trial court denied relief without an evidentiary hearing after finding Aros had failed to establish prejudice flowing from any of the three omissions he claims constituted deficient performance by counsel. This petition for review followed. We will not disturb an order denying post-conviction relief for lack of a colorable claim unless the court has clearly abused its discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006).

¶3 "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *Id.* ¶ 21; *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). Failure to show either deficient performance or resulting prejudice "is fatal to an ineffective assistance claim." *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68; *see also State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶4 In his petition below, Aros first asserted trial counsel had been ineffective in arguing an oral motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. Aros contended counsel had mistakenly urged the court to dismiss count five, rather than

count four, of the indictment and argued incorrectly that there was insufficient evidence to establish the digital penetration alleged in count two. Second, Aros claimed trial counsel was ineffective in failing, at the conclusion of the state's case, to renew her motion to sever the trial on the unlawful-flight charge from his trial on the sexual assault charges. Finally, Aros asserted counsel should have requested a curative jury instruction to underscore that the jury could find he had attempted to evade police because he believed "he was being pulled over because of a warrant [from] Maricopa County" on other, unrelated charges and not "because of a guilty mind relating [to] the sexual assault[s]."

¶5 In its minute entry ruling, the trial court separately discussed each of Aros's three assertions. It first found Aros had failed to establish any prejudice from counsel's alleged omissions in connection with the Rule 20 motion because the court would not have dismissed the challenged counts of the indictment in any event. As to counsel's failure to renew her motion to sever the flight count for trial and failure to request a limiting instruction, the court ruled counsel's omissions had not fallen below the standard of care in either case. Moreover, the court found, Aros had not been prejudiced as a result because the court would neither have granted a renewed motion to sever nor given a limiting instruction, even had counsel moved for both.

¶6 In short, the trial court found none of Aros's assertions stated a colorable claim of ineffective assistance of counsel and thus denied relief summarily pursuant to Rule 32.6(c) without an evidentiary hearing. *See State v. Runningeagle*, 176 Ariz. 59, 63, 859

P.2d 169, 173 (1993) (colorable claim is one that, if proven, might have yielded different outcome). On review, Aros essentially repeats the allegations of his petition for post-conviction relief without explaining why or how the trial court abused its discretion in denying relief. *See generally* Ariz. R. Crim. P. 32.9(c)(1)(ii), (iv). Because we have discerned no such abuse, *see Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d at 67, we grant the petition for review but likewise deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge